RASAMALAR GNANASUNDRAM A

v.

LETHA MADHAVAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
VAZEER ALAM MYDIN MEERA JC
[SUIT NO: 23NCVC-34-2011]
20 SEPTEMBER 2011

CIVIL PROCEDURE: *Estoppel - Issue estoppel - Suit for libel based on show-cause letter - First suit already decided letter not defamatory of plaintiff - Second suit on same subject-matter struck off for res judicata and issue estoppel - Whether plaintiff's failure to plead particulars of date and manner of publication of alleged libel fatal - Whether application to strike out claim on ground of limitation not permissible for failure to expressly plead Limitation Act in defence - Limitation Act 1953, s. 4 - Rules of the High Court 1980, O. 18 rr. 12 & 19* C D

The plaintiff and the defendants were members of a branch of the Rotary Club ('the club'). The plaintiff was the club's secretary at the material time. The club issued her a letter ('the letter'), signed by its president ('the President') to show cause why her membership with the club should not be terminated on the ground that she had allegedly, *inter alia*, doctored the minutes of the club's Board of Directors' meeting to reflect her personal opinions on a number of subjects, fabricated matters not deliberated and allegedly made disparaging remarks of the board. The plaintiff brought the instant action for libel against the defendants for allegedly conspiring and abetting with the President to defame her. She alleged the contents of the letter were defamatory of her and was read by other members of the club. The plaintiff had earlier sued the President in another suit ('the first suit') based on the letter but the claim was dismissed on the ground that the letter was written on an occasion of qualified privilege. A second suit by the plaintiff against six other members of the club's Board of Directors based on the same subject matter was struck out on the ground of *res judicata* and issue estoppel. The first and third defendants applied to strike out the instant action on the ground that the action was not only time-barred but was a third attempt by the plaintiff to re-litigate the subject-matter of the two earlier suits. The plaintiff submitted that the defendants' application on E F G H I

A the ground of limitation should fail because they had not expressly pleaded the Limitation Act as a defence as was required by s. 4 of the Limitation Act 1953.

Held (striking out claim against first and third defendants with costs):

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(1) The plaintiff's suit was barred by issue estoppel. Her claim was anchored on the letter. The High Court in the first suit had determined that the letter was published on an occasion of qualified privilege and that there was absence of malice on the part of the defendant therein. That finding was final as the Court of Appeal had affirmed it and the Federal Court had denied the plaintiff leave to appeal. The issue of whether the letter was defamatory of the plaintiff had been decided by the court. (paras 22, 19 & 20)

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D **(2)** The doctrine of issue estoppel was not limited in its application to the same parties in two different actions but also extended to actions involving their privies or to those who had privity of interest. (para 27)

(3) Though the defendant in the first suit was different from the E defendants in the instant suit, the defendants herein had privity of interest in the subject-matter and were integrally connected to the act complained of by the plaintiff. In fact, the plaintiff alleged the defendants herein were co-conspirators with the defendant in the first suit in publishing the letter. (para 28))

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(4) No explanation was offered by the plaintiff as to why she could not have, with reasonable diligence, made the defendants herein co-defendants in the first or even the second suit and sought therein the relief she was claiming in this action as it was clear from the pleadings and the evidence that she knew of the nexus between all G the defendants. (para 29)

(5) The time and manner of publication of the alleged libel was not stated in the plaintiff's statement of claim. The plaintiff did not give it a date. This was clearly insufficient to found a cause of action in H defamation. The failure to provide sufficient details of publication offended against O. 18 r. 12(1) of the Rules of the High Court 1980. (para 14)

(6) The non-pleading of the Limitation Act in the defence or in the summons was fatal to the first and third defendants' application to I strike out the claim on the grounds of limitation. (para 12)

Case(s) referred to:

Allsop v. Church of England Newspaper Ltd [1972] 2 QB 161 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Batcha Ammal v. Ponnachi [1965] 1 LNS 11 FC ***(refd)***
Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***
Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors [1976] 1 AC 853 ***(refd)***
Chong Kew v. Leow Lay & Ors [2009] 1 CLJ 756 CA ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (and Other Appeals) [2003] 4 CLJ 505 CA ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 287 HC ***(refd)***
North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 ***(refd)***
Peter Gibson J in Lawdor v. Gray [1984] 3 All ER 345 ***(refd)***
Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***
Tan Seng Hin v. Editor of "See Hua Daily News" & Anor [2009] 7 CLJ 265 HC ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 8(1), 38(1)(a), 40(3)
Civil Law Act 1956, s. 7(5)
Limitation Act 1953, ss. 4, 6
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 rr. 12(1), 19(1), (a), (b), (c), (d), O. 78 r. 2

For the plaintiff - G Rathimalar; M/s Rathi MG & Assocs
For the defendants - A S Gill; M/s A S Gill & Salina

Reported by Ashok Kumar

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The plaintiff's claim is for libel. The plaintiff was a member of the Rotary Club of Brickfields, Kuala Lumpur ("the club") and was the secretary for the 2003/2004 term of office. The defendants were also members of the club.

[2] Sometime on or about 30 June 2004 the plaintiff received a show cause letter dated 15 June 2004 ("the said letter") from the club. The said letter read as follows:

15th June 2004

WITHOUT PREJUDICE AND STRICTLY PRIVATE AND CONFIDENTIAL

Rotarian G Rasamalar
1, Lorong Sentul Endah
51000 Kuala Lumpur

Dear Rotarian Rasamalar,

Subject: Show Cause Letter

At the 7th Board meeting held on June 13, 2004, the following serious points of concern about you were raised:

1. That the minutes presented by you as the secretary of the club was not a true and fair reflection of the actual deliberations of the board during the sixth Board Meeting on the 9 May 2004. In particular, that you doctored the minutes to reflect your personal opinions on a number of subjects and added to the contents of the minutes lies and fabrications of the true discussions that transpired. This constitutes a serious dereliction of duty and a breach of the trust reposed to you by the board.

2. You had alleged in your minutes that the resolution, minuted as item 10(a), was made in bad faith by the board. There are two repercussions of this minute. Firstly, this is an allegation that the entire board is unfit and it seriously disparages the personal integrity of each and every board member. Secondly, and perhaps more importantly, this allegation was not made at the board meeting by you and therefore your minute of it, is a fabrication. You have inserted this through personal volition, with a view to discrediting and undermining the board and it is an utter falsehood of what actually transpired."

3. Further, in minute 10(a) you make disparaging remarks about the board and accuse the board of running a 'cult' organization. This is a very serious accusation and severely undermines the good standing of the Rotary Club of Brickfields and members. Once again, this statement was not made by you at the meeting and your minute of it is a complete fabrication.

4. Your assertion in your minutes 10(b) that PP Dr Siva concurred with your views is also a fabrication, as PP Siva has denied this. Furthermore you had misled the board members by your assertion that the club may be committing CBT if the OBS Boat project is supported by the club. The board members find it strange that when PDG Dato' Low Teong was speaking on the

matter at our club meeting, you had ample opportunity to state this but had kept quiet. This is clearly an indication of bad faith and unrotarian like conduct on your part."

5. Your behaviour and actions as mentioned above have seriously undermined the authority of the board and brought the Rotary Club of Brickfields into disrepute. A such, the board of directors of the Rotary Club of Brickfields has unanimously agreed to request you to show cause why your membership in the Rotary Club of Brickfields should not be terminated.

Thank you.

Yours in Rotary,

(Signed)
President

cc. RC Brickfields Board members

[3] The plaintiff claims that the defendants conspired and abetted one Kan Chee Wee to publish the said letter, the contents of which the plaintiff alleges is defamatory. The plaintiff states that the said letter was sent to members of the club including one Dato' IR A P Perumal and was read by members of the club.

[4] The 1st and 3rd defendants filed an application by summons (encl. 6) to strike out the plaintiff's claim under the various limbs of O. 18 r. 19 of the Rules of the High Court 1980 (RHC). The grounds in support of the application were divided into two. The first was under O. 18 r. 19(1)(a) of the RHC 1980 on the grounds of limitation of action. Counsel for the 1st and 3rd defendants submit that the said letter was dated 15 June 2004 and the publication is said to have been made on 30 June 2004 when the plaintiff received the same. The cause of action is defamation, a tort, for which the prescribed limitation period under s. 6 of the Limitation Act is six years. The 1st and 3rd defendants submit that the six years' limitation would have expired on 30 June 2010. The 1st and 3rd defendants argue that this action filed on 15 April 2011 is therefore, clearly out of time.

[5] The second ground is premised on O. 18 r. 19(1)(b), (c) and (d) of the RHC. The 1st and 3rd defendants state that the plaintiff had instituted proceedings against the said Kan Chee Wee, the writer of the said letter, *vide* Kuala Lumpur High Court Civil Suit No. S-23-52-2004 ("the first suit"). On 28 January 2009 the High Court following full trial of the action, dismissed the plaintiff's claim in the first suit with cost on the grounds that the said letter was written on an occasion of qualified

privilege. The full grounds of judgment of Justice Tengku Maimun binti Tuan Mat in the first suit are found at pp. 124-130 of encl. 7 (the affidavit of the 1st defendant). The plaintiff's appeal against that judgment was dismissed with cost by the Court of Appeal. The plaintiff's application for leave to appeal to the Federal Court was dismissed on 8 October 2010. The plaintiff then made an application to the Federal Court to review its earlier decision, which was also dismissed with cost on 5 April 2011.

[6] After the dismissal of the first suit, the plaintiff proceeded to institute a second suit on the same subject matter but this time against six other defendants *vide* Kuala Lumpur Civil Suit No. S-23-57-2010 ("the second suit"). These six defendants were members of the board of directors of the club at the material time and had given evidence in the first suit.

[7] On 11 February 2011 the second suit was struck out by the High Court on grounds of *res judicata* and issue estoppel as the same matter had been heard, adjudicated and disposed of in the first suit.

[8] The 1st and 3rd defendant herein complain that this is the third attempt by the plaintiff to litigate the same subject matter having failed in her two earlier tries. They argue that *res judicata* and issue estoppel would bar her from bringing this action. The 1st and 3rd defendants further argue that the plaintiff cannot litigate her claim by installments.

[9] Let me first examine the submissions of counsel in respect of the issue of limitation. I have earlier canvassed the arguments by counsel for the 1st and 3rd defendants regarding the issue of limitation. I do not wish to repeat them here. Counsel for the plaintiff on the other hand submits that the 1st and 3rd defendant's grounds of application to strike out the claim does not state the relevant statute of limitation relied on by the 1st and 3rd defendants. Counsel relies on the Federal Court decision in the case of *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751 as authority for the proposition that an application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act 1953 which provides that:

4. Limitation not to operate as a bar unless specially pleaded.

Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[10] In the 1st and 3rd defendant's defence, at para. 18, they have averred as follows:

> 18. Tuntutan plaintif adalah diperangkap oleh had masa memandangkan bahawa ianya diinstitusikan lebih dari 6 tahun dari masa kausa tindakan, jika ada, bermula.

[11] Clearly, the 1st and 3rd defendants have not expressly pleaded the Limitation Act as a defence to the plaintiff's claim nor have they made mention of it in the summons applying to strike out the claim. This would not be in conformity with the requirement of s. 4 of the Limitation Act and as such would not operate as a bar to an action. In such circumstances, an application for striking out pleadings on the grounds of limitation would fail as was established in the recent Federal Court decision of *Tasja Sdn Bhd v. Golden Approach Sdn Bhd (supra)* where James Foong FCJ speaking for the Federal Court held as follows:

> [25] After scrutinizing the authorities above we agree with the submission of the plaintiff that in an application for striking out under O. 18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s. 2(a) of PAPA or s. 7(5) of the Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. *However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act.* Our reasons are these:
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> [26] Section 4 of the Limitation Act is explicit when it declares that "nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded ...". This phase is clear and unambiguous. It demands the defendant to expressly state this as a defence before it can become effective. This differs from s. 2(a) of PAPA which said that no suit, action, prosecution or proceeding "shall not lie or be instituted unless" it is commenced within a certain specified time. The same applies to s. 7(5) of the Civil Law Act which says "such action shall be brought within three years after the death of the deceased's person". This is absolute and as Thomson LP in *Kuan Hip Peng v. Yap Yin & Anor (supra)* said it "gives no room for doubt as to when it begins to run". And on top of this there are exceptions provided in the Limitation Act as well as the option for the defendant to waive this defence. These are absent in both the PAPA and the Civil Law Act. Thus, to allow a defendant's application to strike out the plaintiff's case even before such events have occurred and deprive the plaintiff an opportunity to explain why limitation does not apply would cause injustice to the plaintiff. *Further, it is against the express provision of the law (s. 4 of the Limitation Act)*

which requires a defence of limitation to be pleaded before it can be effected. When such a defence of limitation under the Limitation Act is not absolute and is required by law to be pleaded before it can be considered, then a defendant's application for striking based on this Act should not be allowed.

[27] We must stress that we are not departing from the previous decisions decided by this court. The case of *Kuan Hip Peng v. Yap Yin & Anor (supra)* is distinguished on the ground that the striking out application was based on an absolute limitation of s. 7(5) of the Civil Act. And in the *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors (supra)* and *Tio Chee Hing & Ors v. Government of Sabah (supra),* both were based on the limitation set out in PAPA. *In those types of cases, striking out without the need to plead limitation can be entertained but not, and we repeat, not in a situation where limitation is grounded on the Limitation Act.* (emphasis added)

[12] Having considered the pleadings, submissions and authorities on the issue of limitation, I am in agreement with submissions of the counsel for the plaintiff that the non-pleading of the Limitation Act in the defence or the summons is fatal to the 1st and 3rd defendant's application to strike out the claim on the grounds of limitation.

[13] When considering the arguments on the issue of limitation, I noticed a flaw in the plaintiff's pleadings. In an action for defamation the cause of action accrues from the moment of publication. Now publication must be to a third party and not to the plaintiff. Computation of time for limitation for an action in defamation starts from date of publication. Therefore, it would be necessary to determine the date of publication from the pleadings. In the statement of claim, in particular paras. 12 and 13, the plaintiff's averment as to publication is as follows:

12. Oleh kerana kelalaian defendan-defendan yang telah merujuk kepada plaintiff sebagai seorang yang tidak jujur, tidak beramanah, tidak bertanggungjawab dan tidak boleh dipercayai, plaintif berasa amat malu dan resah kerana surat tersebut telah dibaca oleh ahli-ahli rotary yang lain.

13. Setakat itu, seorang ahli rotary bernama Dato' IR A P Perumal sebagai PW2 dalam tindakan tersebut telah membuat keterangan bahawa beliau menerima surat tersebut.

[14] In *Batcha Ammal v. Ponnachi* [1965] 1 LNS 11, the court held that pleadings should contain sufficient particulars to ensure that the parties are informed with reasonable clarity as to the matters which are alleged against them. Now looking at the statement of claim, the time and manner of publication is not stated. This is clearly insufficient to found a cause of action on defamation. The plaintiff did not provide sufficient details of publication. The plaintiff did not give it a date. Apart

from stating that one Dato IR A P Perumal had received a copy of the said letter, there are no further particulars. This offends O. 18 r. 12(1) of the RHC which provides that:

> Subject to para. (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

[15] The High Court in *Tan Seng Hin v. Editor of "See Hua Daily News" & Anor* [2009] 7 CLJ 265 held that the pleadings therein had failed to satisfy the procedural rules which need to be complied with in respect of a defamation suit. The court referred to *Allsop v. Church of England Newspaper Ltd* [1972] 2 QB 161 and O. 78 r. 2 of the RHC where it was held that in an action for libel the plaintiff was required to endorse the writ with a statement giving sufficient particulars of publication in respect of which the action is brought to enable them to be identified. This, the plaintiff has failed to do.

[16] Now moving on to the issue of *res judicata* and issue estoppel, having perused the pleadings in all three cases I find that the factual matrix which forms the substance of the plaintiff's claim in the first suit, the second suit and the present suit are the same, albeit that the defendants are different in the three suits. A comparison of the pleadings in the three suits reveals the following:

(i) the cause of action is libel;

(ii) the libel is said to arise from the publication of the said letter;

(iii) the defence is one of qualified privilege and/or fair comment; and

(iv) the reply to the defence are premised on the same facts.

[17] When a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, neither party will be allowed in a future suit or proceeding to canvass the same matter again. That is the principle of *res judicata*. (See the cases of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; *Chong Kew v. Leow Lay & Ors* [2009] 1 CLJ 756, and *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35.

[18] The fact that the defendants in the three suits are different does not bar the application of the principles of issue estoppel where the subject matter in the suits had been litigated and the issues determined by a court of competent jurisdiction. In *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351 Abdul Malek J (now JCA) in following the decision of Drake J in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 held that where an issue had been decided in a court of competent jurisdiction, that very issue would not be allowed to be raised in separate proceedings between different parties where the subject matter arises out of identical facts and is dependent on the same evidence. The rationale being that the party would not only be prevented from doing so by the doctrine of issue estoppel but it would be an abuse of process to allow the issue to be relitigated.

[19] The plaintiff's claim is anchored on the said letter. The High Court in the first suit had determined that the said letter was published on an occasion of qualified privilege and that there was absence of malice on the part of the defendant. That finding is final as the Court of Appeal has affirmed it and the Federal Court has denied the plaintiff, leave to appeal.

[20] Now, in the present suit the plaintiff claims that the defendants had conspired and abetted the said Kan Chee Weng to issue the said letter and had therefore defamed the plaintiff. The issue of whether the said letter is defamatory of the plaintiff has been decided by the High Court, ie, a court of competent jurisdiction, in the first suit.

[21] The specific finding of the learned High Court Judge in the first suit in respect of the said letter and the allegation of defamation (as found at p. 130 of encl. 7 – the affidavit of the 1st defendant) is as follows:

> I find that there is overwhelming evidence that the said letter was issued by the defendant not in his personal capacity but in his capacity as the president of the club pursuant to the unanimous decision of the Board. The board members therefore have a corresponding interest to receive copies of the show cause letter given their decision on the same (see *S Pakianathan v. Jenni Ibrahim & Another case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233. Hence, the said letter was undoubtedly issued to the plaintiff and board members on the occasion of qualified privilege. Given the evidence of the defendant's witnesses, the plaintiff's contention that the board has no power to authorize the issuance of the said letter and that there was no quorum for the meeting held on 13 June 2004 is without merit. I accept the evidence of DW7 that he did not hand copies of the said letter to persons other than the board members and I find that the plaintiff has not proven malice. In the circumstances the plaintiff's claim is dismissed with costs.

[22] Therefore, the present suit is but an attempt to relitigate the same issue to ask this court to come to a different conclusion. This, the plaintiff cannot do for the doctrine of *estoppel per rem judicatum* which includes issue estoppel would bar her. *Res judicata* is not merely confined to the issues which the court is asked to decide but also covers issues or facts which are so clearly part of the subject matter of the litigation.

[23] The present claim is premised on facts and issues similar to that pleaded in the first suit with the only difference being that reference to acts attributed to Kan Chee Weng have been changed to the defendants herein. This is a clear abuse of process as all the facts pleaded in the first suit have been fully ventilated in the trial and decided upon by the High Court. Finality has been achieved in the previous litigation and as such there must not be any further agitation of the matter in this court.

[24] In answer to the submissions of the counsel for the 1st and 3rd defendants, counsel for the plaintiff has referred to the Court of Appeal decision in *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (and Other Appeals)* [2003] 4 CLJ 505 for the proposition that *res judicata* cannot apply to cases where there are different defendants. Counsel in particular refers to the judgment of Mohd Noor Ahmad JCA at p. 666 where it was held as follows:

> Whatever it is *res judicata* can never be applied in favour of the defendants because *res judicata* only prohibits a cause of action from being re-litigated between the same parties but in that case the defendants were never a party.

[25] With respect I must say that, that observation may be the correct position in so far as cause of action estoppel is concerned. However, the decision in *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors and Other Appeals* does not deal with the second type of estoppel *per rem judicatum*, namely issue estoppel. As pointed out by Peh Swee Chin FJC in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd (supra)*:

> Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
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> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie, the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be re-litigated between the same parties because it is *res judicata*.

A In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately B or due to inadvertence. A few cases below will illustrate the point.

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C On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, D or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with *Peter Gibson J in Lawdor v. Gray* E [1984] 3 All ER 345, 350 who said: "Issue estoppel … prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action".

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

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There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues G which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ie. doctrine of estoppel *per rem judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader H approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding I population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[26] In fact the principles enunciated by Peh Swee Chin FCJ in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd (supra)* was in tandem with the development of the law in respect of the principle of *res judicata* in other common law jurisdictions. In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors* [1976] 1 AC 853 Lord Guest, after stating that the principle of *res judicata* has developed so as to encompass what is now described as issue estoppel, said at p. 935:

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[27] Therefore, it is very clear from these high authorities that the doctrine of issue estoppel is not limited in its application to the same parties in two different actions but also extends to actions involving their privies or to those who have privity of interest. In fact in *Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors* [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 287 Richard Tallala J (as he then was) applied the doctrine of issue estoppel where there was privity of interest between different defendants in two separate actions brought by the same plaintiff. In that case the learned judge held that:

> It has been stated in the Supreme Court that even where *res judicata* is not strictly established or where estoppel *per rem judicatam* has not been sufficiently pleaded or made out but nevertheless the circumstances are such as to render any reagitation of the question formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action. See the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 wherein His Lordship considered that it would suffice in that regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v. A-G for Quensland* [1979] AC 411.

[28] Applying the principles enunciated by the Federal Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd (supra)* and upon perusal of the pleadings and the evidence led in the first suit and the pleadings, affidavit evidence and the written submissions by counsel for both parties I am satisfied that:

(i) the issues being canvassed by the plaintiff herein are the same issues that were ventilated in the first suit and ruled on by the High Court.

(ii) the findings and judgment of the High Court in the first suit is final as the plaintiff has exhausted all avenues of appeal;

A (iii) though the defendant in the first suit is different from the defendants herein, I find that the defendants herein have privity of interest in the subject matter and are integrally connected to the act complained of by the plaintiff. In fact the plaintiff alleges that the defendants herein are co-conspirators of the defendant in the first
B suit in having the said letter published.

[29] The plaintiff has failed to offer any explanation as to why she could not have with reasonable diligence made the defendants herein co-defendants in the first suit or even the second suit. From the pleadings and the evidence before me it is clear that the plaintiff knew of the nexus
C between the defendants herein and the defendant in the first suit and by exercising reasonable diligence could have sought in the first suit the relief she was claiming in this action. It seems to me that having failed not just in the first and second suits, the plaintiff is now seeking a third bite at the proverbial cherry.

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[30] There is one other issue that was raised by the counsel for the plaintiff in her submissions which I would now discuss for sake of completeness. When the plaintiff instituted proceedings the 3rd defendant had already been adjudged a bankrupt. The official search report exhibited in the plaintiff's affidavit shows that the adjudicating and
E receiving orders were made on 2 February 2005. Counsel argues that the 3rd defendant is incompetent to file the summons to strike out the plaintiff's claim by virtue of s. 38(1)(a) of the Bankruptcy Act 1967 which states that:

F Where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency.

G

[31] Plaintiff's counsel submits that since the prior sanction of the Director General of Insolvency was not obtained the 3rd defendant is incompetent to file the application to strike out the plaintiff's claim. I find this an empty self-serving argument. Now s. 38(1)(a) of the Bankruptcy Act states that a bankrupt shall be incompetent to maintain any action
H without the previous sanction of the Director General of Insolvency. Here, the 3rd defendant is not maintaining an action. To the contrary, the 3rd defendant is seeking to strike out the action. It was not the 3rd defendant who instituted proceedings against the plaintiff. In fact it would seem that it is the plaintiff who is in breach of the provisions of
I s. 8(1) of the Bankruptcy Act 1967 which provides that once a receiving order has been made no action can be commenced nor maintained against a bankrupt without the leave of court in respect of any debt

provable in bankruptcy. The plaintiff claims for quantified liquidated damages of RM500,000. A broad reading of s. 8 and s. 40(3) of the Bankruptcy Act 1967, suggests that leave of court would have to be obtained before the action is commenced. Yet, the plaintiff knowing well the 3rd defendant's status as a bankrupt had proceeded to commence this action without leave of court.

[32] The law as regards to striking out pleadings is well settled and I do not wish to repeat them. Suffice to say that I have referred to and taken guidance from some of the leading high authorities on this area of the law, including *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. I find that this is a fit and proper case for the exercise of my powers to strike out the claim as the plaintiff's claim is obviously unsustainable and is an abuse of process.

[33] In the premise I allowed the 1st and 3rd defendants' application as contained in paras. (a) and (b) encl. 6 and ordered that the plaintiff's claim against the 1st and 3rd defendant be struck off with cost of RM5,000.